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04
05 UNITED STATES DISTRICT COURT
06 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

07 MARK M. RUFENER,) CASE NO. C07-0068 RSL
08)
Plaintiff,)
09)
v.) REPORT AND RECOMMENDATION
10) RE: SOCIAL SECURITY
MICHAEL J. ASTRUE,) DISABILITY APPEAL
Commissioner of Social Security,)
11)
Defendant.)
12)

13 Plaintiff Mark M. Rufener proceeds through counsel in his appeal of a final decision of the
14 Commissioner of the Social Security Administration (Commissioner). The Commissioner denied
15 plaintiff's application for Supplemental Security Income (SSI) benefits after a hearing before an
16 Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record
17 (AR), and all memoranda of record, it is recommended that the decision be REMANDED for
18 further administrative proceedings consistent with this Report and Recommendation.

19 **FACTS AND PROCEDURAL HISTORY**

20 Plaintiff was born on XXXX, 1961.¹ He is a high school graduate and has vocational

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22 ¹ Plaintiff's date of birth is redacted back to the year of birth in accordance with the
General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the

01 training as a travel agent. Past work experience includes employment as a food products sales
02 representative, a driver for sales, and a sales clerk. Since the alleged onset of disability, he has
03 sold nutritional supplements from his home. Plaintiff protectively filed an application for SSI
04 benefits on June 18, 2002. His application was denied at the initial level and on reconsideration,
05 and he timely requested a hearing, which was held on January 31, 2005. (AR 628-84, 658A-B,
06 659A, 662A-K.) A decision was issued on October 20, 2005 finding plaintiff not disabled. (AR
07 13-23.)

08 Plaintiff timely appealed to the Appeals Council. After considering additional evidence,
09 the Appeals Council denied the request for review (AR 6-9), making the ALJ's decision the final
10 decision of the Commissioner. Plaintiff timely appealed to this Court.

11 **JURISDICTION**

12 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

13 **DISCUSSION**

14 The Commissioner follows a five-step sequential evaluation process for determining
15 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must
16 be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not
17 engaged in substantial gainful activity (SGA) since his alleged onset date. His home business of
18 selling nutritional supplements was found to not meet SGA levels. At step two, it must be
19 determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff to have
20 severe impairments consisting of retinal detachment of his right eye, bipolar disorder, and HIV.

21 _____
22 official policy on privacy adopted by the Judicial Conference of the United States.

01 Step three asks whether a claimant's impairments meet or equal a listed impairment. The ALJ
02 found that plaintiff's impairments did not meet or equal the criteria for any listed impairment. If
03 a claimant's impairments do not meet or equal a listing, the Commissioner must assess residual
04 functional capacity (RFC) and determine at step four whether the claimant has demonstrated an
05 inability to perform past relevant work. The ALJ found plaintiff's vision problems did not cause
06 more than minimal limitations. The ALJ found that plaintiff had the RFC to occasionally lift
07 twenty pounds, frequently lift ten pounds, stand and/or walk for six hours in an eight-hour day,
08 sit for six hours in an eight hour day, and do unlimited pushing and pulling. He could not climb
09 ladders, ropes or scaffolds and could occasionally balance and crouch. He needed to avoid
10 concentrated exposure to extreme cold, extreme heat, and hazards. He could only work with
11 limited public interaction and could do three-step tasks. With this functional capacity, the ALJ
12 concluded that plaintiff could not perform his past relevant work. If a claimant demonstrates an
13 inability to perform past relevant work, the burden shifts to the Commissioner to demonstrate at
14 step five that the claimant retains the capacity to make an adjustment to work that exists in
15 significant levels in the national economy. The plaintiff was found able to perform a significant
16 range of light work, and was capable of making a vocational adjustment to other work existing
17 in significant numbers in the national economy, including the position of document preparer.

18 This Court's review of the ALJ's decision is limited to whether the decision is in
19 accordance with the law and the findings supported by substantial evidence in the record as a
20 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more
21 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable
22 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750

(9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

Plaintiff argues that the ALJ erred in failing to consider whether the combination of his impairments met or equaled one of the Listing of Impairments at step three of the sequential evaluation process.² Plaintiff also contends that the ALJ improperly rejected his credibility, and that the determination of his RFC was not based on substantial evidence. Plaintiff further argues that the ALJ posed an incomplete hypothetical to the vocational expert (VE).

The Commissioner argues that the ALJ properly assessed the evidence, set out clear and convincing reasons in support of the finding relating to plaintiff's credibility, and propounded a hypothetical to the VE that included all limitations the ALJ found supported by the record. The Commissioner also argues that any errors of law were harmless and that the decision should be affirmed.

For the reasons described below, the undersigned concludes that the matter should be remanded for further administrative proceedings.

Listing of Impairments

If a claimant has an impairment meeting the criteria in the "Listing of Impairments", 20 C.F.R. Ch. III, Pt. 404, Subpt. P, App. 1, he or she will be found disabled without considering age, education or work experience, as the listed impairments are considered severe enough to presumptively prevent gainful activity. 20 C.F.R. § 416.920(d). The regulations also provide that

² In his reply, plaintiff withdrew his contention that the ALJ failed to consider any limitation related to his right eye retinal detachment.

01 if a claimant has a combination of impairments, no one of which meets a listed impairment, the
02 findings will be compared “with those for closely analogous listed impairments.” 20 C.F.R. §
03 416.926(b)(1)(ii)(3). If the findings related to the impairments are “at least of equal medical
04 significance” to those of a listed impairment, the combination of impairments is considered
05 “medically equivalent” to that listing and the claimant will be found to be disabled. *Id.*

06 Plaintiff argues that, in considering whether he met a listing, the ALJ only considered his
07 HIV and bipolar disorder separately, rather than in combination. The Commissioner argues that
08 plaintiff did not present sufficient evidence to warrant a consideration of the combined effects of
09 his impairments.

10 In discussing plaintiff’s impairments at step three of the sequential analysis, the ALJ set
11 forth the following analysis:

12 In the third step in the evaluation, the undersigned finds that the medical evidence
13 establishes that the claimant’s impairments are not “severe” enough to meet or
14 medically equal, either singly or in combination, any of the impairments listed in 20
15 C.F.R. Appendix 1 to Subpart P of Part 404. Specifically, the undersigned has
16 considered listing 12.04, *affective disorders*. Claimant has some symptoms of this but
17 only has mild restriction of activities of daily living. He lives with a partner and
18 roommate who works outside the home. He maintains his own personal hygiene and
19 extensive medication regimen. He has accessed several social service programs which
20 assist him. He cares for himself and for animals. Claimant has only moderate
21 restrictions on his social functioning. He has friends and socializes, including
22 occasional outside activities. He emails and gets along well with his partner and
roommate. The record shows that he went out drinking, partying, and taking drugs
with his partner. Claimant has only moderate limits on his concentration, persistence,
and pace. The undersigned notes that claimant’s description of his concentration has
varied throughout the record. On October 4, 2004, he reported that he had difficulty
concentrating and focusing. On January 12, 2004, claimant stated that his
concentration was not good, but noted that he maintained a GPA of 4.0. The
undersigned notes claimant’s high grades and the fact that claimant attended school
full time at that point, and finds that claimant’s concurrent claims regarding his
concentration, focus and persistence are not consistent. This negatively affects
claimant’s credibility. The undersigned notes that claimant maintained a high GPA

01 throughout winter 2004 and also took classes in spring and summer 2004 but
02 apparently did not complete the course requirements. The undersigned finds that
03 claimant has not had any episodes of decompensation and does not satisfy the “C”
04 criteria.

05 The undersigned has also considered listing 14.08, *HIV infection*. The medical expert
06 testified that claimant does not meet or equal this listing. Although claimant
07 complained of chronic fatigue, the record does not indicate what that is attributed to.
08 The undersigned notes that when claimant was compliant with his HIV medications,
09 he did well. The medical expert agreed with the state agency medical consultant’s
10 opinion that due to claimant’s HIV, he could do light work. The medical expert
11 questioned claimant’s use of alternative treatments at Bastyr. The undersigned gives
12 great weight to this opinion as it is consistent with the longitudinal record and because
13 the medical expert had the chance to review the entire file. The undersigned finds that
14 claimant’s HIV does not meet or equal a listing.

15 Since claimant’s impairments do not meet or equal the listings, the undersigned moves
16 forward with the analysis. . . .

17 (AR 15; internal citations to record omitted.)

18 Plaintiff contends that the ALJ failed to conduct a legally sufficient step three analysis by
19 only considering his two severe impairments standing alone, instead of focusing on the combined
20 effect of the two impairments. Specifically, plaintiff argues that the combination of his multiple
21 impairments adversely affect his concentration, persistence, and pace to a marked degree. (*See*
22 Dkt. 23 at 2.)

23 The Commissioner cites the case of *Burch v. Barnhart*, 400 F.3d 676, 683 (9th Cir. 2005),
24 in which the Ninth Circuit Court of Appeals declined to find error in an ALJ’s failure to compare
25 the claimant’s impairments in combination to a listing in an equivalency determination, because
26 the claimant “did not offer any theory, plausible or otherwise, as to how his impairments combined
27 to equal a listing impairment.” Plaintiff contends the case is inapposite because he clearly raised
28 the possible connection between his overall problems and his HIV and related medications.

01 If the combined effect of both a mental impairment (such as an affective disorder) and a
02 physical impairment result in limitations equal in severity to the listings, then a finding would be
03 required that the claimant's condition meets the severity of Listing 12.04 and he would be found
04 disabled. *Lester v. Chater*, 69 F.3d 1453, 1463 (9th Cir. 1995). "Equivalence is determined on
05 the basis of a comparison between the 'symptoms, signs and laboratory findings'" of the claimant's
06 impairments and the criteria set forth in the regulations for the listed impairment. *Marcia v.*
07 *Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990) (citing 20 C.F.R. § 404.1526). In considering
08 whether the combination of impairments establishes equivalence, the ALJ must "adequately
09 explain" his or her evaluation of "the combined effects of the impairments." *Id.* An ALJ is not
10 required to state why a claimant has failed to satisfy every section of the listings, as long as the
11 ALJ adequately summarizes and evaluates the evidence. *Gonzales v. Sullivan*, 914 F.2d 1197,
12 1200-01 (9th Cir. 1990).

13 The gravamen of plaintiff's assignment of error is that the ALJ should have considered the
14 fatigue and loss of concentration due to either his HIV medications or from the HIV disease itself
15 in analyzing the "B" criteria of the listing for Affective Disorders, particularly the effect on §12.04
16 (B)(3), difficulties in maintaining concentration, persistence or pace. A review of the ALJ's
17 consideration of the B criteria for Affective Disorders, however, shows that, to the extent the ALJ
18 found it to be supported by the evidence, she considered the impact of fatigue and loss of
19 concentration without regard to the source of such difficulties. The ALJ stated that she was
20 considering plaintiff's impairments both singly and in combination, discussed the evidence, and
21 then concluded that the impairments neither met nor equaled the listings. Plaintiff fails to
22 demonstrate error with respect to the ALJ's step three consideration of whether his impairments

01 met or equaled the criteria for any listed impairment.

02 Plaintiff also takes issue with the ALJ's consideration of the two other impairment-related
03 functional limitations in the B criteria, "Activities of Daily Living" and "Social Functioning", 20
04 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.04 (B)(1) and (2). However, as plaintiff conceded at oral
05 argument, the ALJ's consideration of his difficulties with fatigue and loss of concentration does
06 not impact these two areas of impairment-related functional limitation. Rather, despite the lack of
07 clear articulation of this contention in his briefing, plaintiff asserts the lack of substantial evidence
08 for the ALJ's finding that his activities of daily living were only mildly restricted and his social
09 functioning was only moderately restricted. In particular, plaintiff argues that the bases cited by
10 the ALJ for her findings are not found in the regulations. Plaintiff's argument is non-availing. The
11 regulations include examples of activities that may be representative of limitations in activities of
12 daily living and social functioning, but do not limit the ALJ to considering only those examples.
13 *Id.* at § 12.00 (C)(1) and (2). In discussing plaintiff's impairment-related functional limitations,
14 the ALJ provided legally sufficient reasons for her findings, supported by examples in the record.

15 Plaintiff's Credibility and RFC

16 Absent evidence of malingering, an ALJ must provide clear and convincing reasons to
17 reject a claimant's testimony. *See Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001); *see*
18 *also Thomas*, 278 F.3d at 958-59. If the ALJ finds that the claimant's testimony as to the severity
19 of his pain and impairments is unreliable, the ALJ must make a credibility determination with
20 findings sufficiently specific to permit the court to conclude that the ALJ did not arbitrarily
21 discredit the testimony. *Thomas*, 278 F.3d at 958 (citing *Bunnell v. Sullivan*, 947 F.2d 341, 345-
22 46 (9th Cir. 1991)). The ALJ may consider "at least" the following factors in evaluating the

01 claimant's credibility: his reputation for truthfulness; inconsistencies either in his testimony or
02 between his testimony and his activities; and testimony from physicians and third parties
03 concerning the nature, severity, and effect of the symptoms of which he complains. *Id.* at 959
04 (citing *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997)). "If the ALJ's credibility
05 finding is supported by substantial evidence in the record, we may not engage in second-guessing."
06 *Id.* (citing *Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999)).

07 Plaintiff argues that the ALJ failed to provide clear and convincing reasons for discrediting
08 his testimony. He also claims that the ALJ's determination of his RFC was not based on
09 substantial evidence because of this error in the assessment of his credibility. He challenges the
10 ALJ's analysis of his daily activities, and also contends that the ALJ impermissibly considered
11 activities in which he engaged before applying for benefits. Plaintiff contends that his utilization
12 of naturopathic physicians should not have been considered as a reflection on his credibility, and
13 disagrees with the ALJ's suggestion that he was exaggerating his symptoms for secondary gain.
14 The Commissioner avers that the ALJ considered relevant evidence and that the assessment of
15 plaintiff's credibility was supported by the record.

16 The ALJ discussed plaintiff's credibility in several contexts. In considering plaintiff's
17 limitations on concentration in the context of the step three evaluation, the ALJ noted:

18 The undersigned notes that claimant's description of his concentration has
19 varied throughout the record. On October 4, 2004, he reported that he had difficulty
20 concentrating and focusing. On January 12, 2004, claimant stated that his
21 concentration was not good, but noted that he maintained a GPA of 4.0. The
22 undersigned notes claimant's high grades and the fact that claimant attended school
fulltime at that point, and finds that claimant's concurrent claims regarding his
concentration focus and persistence are not consistent. This negatively affects
claimant's credibility. The undersigned notes that claimant maintained a high GPA
throughout winter 2004 and also took classes in spring and summer 2004 but

01 apparently did not complete the course requirements. . . .

02 (AR 15; internal citations to record omitted.) In assessing plaintiff's credibility and RFC, the ALJ
03 found:

04 . . . The undersigned finds that claimant's testimony is not consistently credible. As
05 noted, claimant reported his limitations inconsistently at times, sometimes giving
06 reports of severe limitations that did not correspond with his wide range of activities.
07 The record shows that claimant is capable of a good range of activities of daily living.

08 . . .

09 On November 29, 2000, claimant admitted that he uses prescription drugs such as
10 Vicodin, Percocet and Valium to cope with his stress. On January 24, 2002, claimant
11 reported that he self-medicated with Percocet and Valium. He admitted to binge
12 drinking. He took a friend's Xanax. The undersigned notes that claimant abused
13 substances and used prescription drugs which he had not been prescribed; this
14 negatively affects his credibility.

15 Many notes in the record show that claimant participates in varied activities that are
16 social in nature and require concentration, persistence, and pace. On May 30, 2001,
17 claimant reported that he was increasingly motivated at work and had a new business
18 partner. On August 20, 2001, claimant reported that he was working, doing a lot of
19 projects, growing his business, and becoming a Reiki master. On January 22, 2002,
20 claimant reported that he visited Palm Springs to participate in a softball tournament.
21 On March 14, 2004, he reported that he managed more things in his life than the
22 average person, which included a household with pets, a small business, a new
23 relationship and his personal needs. On June 20, 2002, claimant reported that he had
24 been playing softball. Claimant regularly sought care from various practitioners,
25 including naturopaths in Seattle and an herbalist in San Diego. On June 2, 2003,
26 claimant reported that he co-managed his softball team.

27 Some of the claimant's behavior indicates possible secondary gain. On October 1,
28 2002, he saw Ms. Baldwin and was very agitated because DSHS cut off his benefits.
29 He continued to be agitated even when they found out that he was cut off because
30 he had failed to supply requested information. He told Ms. Baldwin that his partner
31 and he had purchased a home and he wanted his Section 8 voucher to cover part of
32 the cost. He made threats over the telephone to the SCO worker. The undersigned
33 notes that claimant and his partner had the resources to buy a new house and car.

34 . . .

01 Some of claimant's doctors noted problems with claimant's reliability in taking his
02 prescribed medications. On January 23, 2002, Dr. Bennett stated that claimant had
03 problems with taking his psychotropic medications at full recommended doses. On
04 July 15, 2002, Robert Coombs, M.D., stated that claimant's C4 count had decreased.
05 Claimant stated that he was unaware of any herbal medications or other alternative
medicine therapies that would affect that. However, on that same day, claimant saw
Ms. Baldwin, his case manager, and stated that his CD4 count may have dropped
because he slipped on his naturopathic program. This negatively affects claimant's
credibility.

06 (AR 16-18; internal citations to the record omitted.) Later, in further discussing plaintiff's RFC,
07 the ALJ continued:

08 Lay evidence includes some questionnaires that claimant completed. In July 2002,
09 claimant stated that he experienced fatigue and could walk for one hour before he
10 needed to rest, stand for two hours, and sit for five hours. He used to be able to
11 alpine snow-ski but could no longer do that. If he found a task mentally and
12 physically taxing, he needed to rest. He groomed himself and cleaned his living area
13 daily and weekly. He did not require assistance with household chores. He prepared
14 his own meals. Lifelong AIDS Alliance provided him with prepared meals when he
15 was too exhausted to make food. He could drive, and frequently left his home to visit
16 friends or relatives. He sometimes had fevers, anxiety, diarrhea, persistent elevated
temperature, swollen lymph nodes, depression, anxiety, comprehension/concentration
problems, and nervousness. He had these less than daily. He required rest periods
during the day and experienced memory problems. He used a Daytimer to manage
his time. He did relaxation exercises when he had racing thoughts. He shared
housekeeping with his partner. He handled his own finances. He read books but
could only get through a chapter at a time. He watched two hours of television per
day. The undersigned notes that these activities show the claimant has the ability to
concentrate and focus on activities.

17 The claimant went to movies, played softball, and was active in politics. He met
18 friends and went camping. He stated that time spent on these activities varied
19 depending on seasons, time and money, but did not state that his impairments limited
20 him in doing activities. He stated he used to have problems dealing with people in
21 authority but that since he started his bipolar medications, he could effectively deal
22 with people in authority. Before he got sick, he could maintain a linear thinking
pattern better. It was currently hard for him to focus, study, and follow through with
tasks.

The claimant's partner completed a questionnaire. He stated the claimant had
scattered/muddled thinking, occasional depression, anxiety and "hyperbehavioral"

01 activity. The claimant changed topics frequently in conversations and his moods were
02 unpredictable. The claimant participated well in conversations. He had friends and
03 was social, yet sometimes became cautious and standoffish. The claimant took care
of a dog and cat. The claimant sometimes participated well in activities outside the
home and sometimes became moody, rude, opinionated, tactless, and paranoid.

04 A DSHS interviewer saw claimant on November 15, 2002, and noted that the
05 claimant appeared very scattered and unorganized. He was difficult to direct in the
06 interview as he rambled in a non-stop, non sequitur manner. The claimant complained
07 of racing thoughts and daily panic attacks, and stated that he was “always in a fight
08 just to meet my basic needs”. The undersigned finds that this presentation seems very
exaggerated given claimant’s better presentation at most of his other appointments
and finds that the claimant could have exaggerated his symptoms for secondary gain.
On November 4, 2002, during his psychiatric consult, the claimant stated he had high
anxiety, recurrent brief manias and an [sic] normal mental status exam.

09 In February 2003, claimant completed a questionnaire with similar information to his
10 questionnaire above. He stated that because of a great psychiatrist and “nearly ideal”
11 medicine, he had the courage to attempt returning to college after being out of school
for 20 years. He stated he was making progress in his life with fewer mistakes.

12 Claimant’s friend completed a questionnaire. She stated that when claimant went off
13 his medications his actions and decisions suffered, and that even when he was on his
14 medication, he had issues. Claimant was highly distractable and could be obsessive
about certain projects. She stated claimant got angry about rules and argued with
officials. She was not sure but she thought claimant needed help with grooming.

15 The undersigned gives weight to the lay evidence to the extent it is consistent with the
16 residual functional capacity. As described above, claimant’s credibility is not
generally good.

17 (AR 19-20.)

18 The ALJ noted that plaintiff improved when he was taking his medications, and had no side
19 effects or symptoms such as mania or sleep disturbance. The ALJ gave “great weight” to the fact
20 that plaintiff was stable while on his medication, and felt overwhelmed and stressed when he went
21 off. (AR 16-17.)

22 Plaintiff argues that the ALJ’s discussion of his activities is insufficiently general. However,

01 the ALJ discussed at length and in considerable detail claimant's daily activities, first as part of
02 the step three sequential analysis and then, with specific references to the record, while addressing
03 plaintiff's functional capacity. (AR 15.) The ALJ discussed questionnaires completed by plaintiff,
04 showing his activities of daily living and self-care activities, interaction with friends, social
05 activities, and other pursuits. (AR 16-19.)

06 Plaintiff contends that the ALJ considered in a negative light his utilization of naturopathic
07 physicians. A review of the decision, however, shows that the ALJ did not make such an
08 inference, but rather cited conflicting comments made by plaintiff to his medical doctor and his
09 case worker about his compliance with his naturopathic program and its impact on his D4 count.
10 In considering plaintiff's testimony, the ALJ may utilize "ordinary techniques of credibility
11 evaluation", such as prior inconsistent statements concerning the symptoms. *Smolen v. Chater*,
12 80 F.3d 1273, 1284 (9th Cir. 1996). In fact, the consistency of a claimant's statements, both
13 internally and with other information in the case record, is considered a "strong" indication of his
14 or her credibility. Social Security Ruling 96-7p (available at 1996 WL 374186 *5).

15 Plaintiff further disputes the ALJ's consideration of his conduct at a state agency interview
16 as evidence of possible secondary gain. (AR 18.) Plaintiff avers that there are no findings to
17 support this conclusion. However, the ALJ may make inferences reasonably drawn from the
18 record, and we must defer to that decision, even if the evidence supports another interpretation.
19 *Batson v. Commissioner*, 359 F.3d 1190, 1193 (9th Cir. 2004). The ALJ cited not one, but two
20 interviews as suggestive of the conclusion that plaintiff could be exaggerating his symptoms for
21 secondary gain. (AR 19.) The ALJ could reasonably conclude that this was a motivational factor
22 in plaintiff seeking benefits.

01 Plaintiff also argues that the ALJ's assessment of his credibility relied impermissibly on
02 activities in which he engaged that pre-dated his application for disability benefits on June 18,
03 2002. Plaintiff correctly notes that the ALJ cited activities that occurred between the dates of May
04 30, 2001 and March 14, 2002 (AR 17), in addition to activities that post-date the application for
05 benefits. The Commissioner argues that plaintiff had applied for benefits on previous occasions,
06 and it was appropriate for the ALJ to consider activities prior to the most recent application date
07 in order to make a longitudinal assessment of plaintiff's impairments.

08 The ALJ's citation of pre-application activities did not include an explanation that the
09 activities were being considered for purposes of a "longitudinal assessment" of plaintiff's
10 impairments. This may have been appropriate, but the ALJ did not articulate this as a reason for
11 the consideration. However, in light of all the other reasons given by the ALJ for evaluating
12 plaintiff's credibility and making findings regarding his RFC, including the fact that all of these
13 activities continued after his disability application date (playing softball, running his business, doing
14 projects), there is substantial evidence to support the ALJ's ultimate conclusion.

15 Although plaintiff argues that some of the evidence was susceptible to a different
16 interpretation than that drawn by the ALJ, the reviewing court does not substitute its judgment
17 where the evidence may reasonably support more than one conclusion. *Verduzco v. Apfel*, 188
18 F.3d 1087, 1089 (9th Cir. 1999) (citing *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998)).
19 The ALJ's findings regarding plaintiff's credibility and RFC are supported by substantial evidence
20 and should not be overturned.

21 Hypothetical to VE

22 At hearing, the ALJ posed separate hypotheticals to the VE with different variables. (AR

01 662G-I.) In response, the VE testified that under the first hypothetical, plaintiff could perform his
02 past relevant work of driver/sales. (AR 662G-H.) Under the second hypothetical, the VE testified
03 that plaintiff would be precluded from all work. (AR 662H.) Considering the third hypothetical,
04 the VE testified that plaintiff would not be able to perform his past relevant work, but could
05 perform the job of document preparer or microfilming. (AR 662I.) In the decision, the ALJ
06 adopted the RFC posed in the third hypothetical. Plaintiff argues that the ALJ erred in not
07 adopting the second, more restrictive, hypothetical.

08 In a hypothetical posed to a VE, the ALJ must only include those limitations supported
09 by substantial evidence. *Ossenbrock v. Apfel*, 240 F.3d 1157, 1164-65 (9th Cir. 2001). An ALJ
10 is free to accept or reject restrictions in a hypothetical question that are not supported by
11 substantial evidence. *Id.* As discussed above, the ALJ's determination to not adopt more
12 stringent mental health restrictions, nor to find that plaintiff could not engage in concentrated work
13 behavior throughout an entire day, was supported by substantial evidence.

14 Plaintiff also contends that the ALJ erred in finding him capable of performing alternative
15 work because the hypothetical that established his capacity to perform this work presumed him
16 to be able to perform jobs requiring "a three-step task", which plaintiff avers is in contradiction
17 to the ALJ's finding that plaintiff was moderately restricted in concentration.

18 The Commissioner did not address this contention in his response brief (Dkt. 25), and
19 offered at oral argument to supplement the briefing. However, the supplemental brief (Dkt. 32)
20 likewise did not directly address the contention, and the Court requested further briefing, to which
21 the parties responded (Dkts. 34 & 35).

22 The Commissioner contends that there is no rule that states that a person with "moderate"

01 limitation in concentration can only perform tasks requiring fewer than three steps. The
02 contention begs the issue. Although a particular finding may not be required or compelled, the
03 ALJ's decision must provide a sufficient basis for a reviewing court to consider the bases for those
04 findings that the ALJ does make. The ALJ specifically included the ability to perform three-step
05 tasks in the hypothetical posed to the VE, and, without a showing to the contrary, this capacity
06 is presumptively material to the VE's opinion that plaintiff was capable of making a vocational
07 adjustment to other work. The ALJ's step-five finding, in turn, was based on the VE's opinion.
08 However, the vocational significance of the ability or non-ability to perform three-step tasks was
09 not addressed by either the ALJ or the VE. The terms are not defined or cross-referenced to a
10 particular regulation. No medical expert, treating or non-treating, appears to have referenced the
11 terms. Perhaps the ALJ and VE understood what was meant by the terms, but the lack of
12 explanation makes this portion of the decision unreviewable.

13 The issue is significant because plaintiff contends that the ability to perform three-step
14 tasks is inconsistent with the ALJ's finding that he was moderately restricted in his ability to
15 concentrate (*see* AR 15, 18). The ALJ's findings must be sufficiently detailed "to permit courts
16 to review those decisions intelligently." *Vincent v. Heckler*, 739 F.2d 1393, 1394 (9th Cir. 1984)
17 (citing *Lewin v. Schwieker*, 654 F.3d 631, 634 (9th Cir. 1981)). Here, the decision should be
18 remanded to allow the ALJ to address the effect of plaintiff's moderate restriction on the ability
19 to concentrate on his ability to perform three-step tasks.

20 CONCLUSION

21 This case should be remanded for further administrative proceedings. On remand, the ALJ
22 should address plaintiff's ability to perform three-step tasks in light of the finding that he has

01 moderate restrictions on concentration, utilizing the services of a VE if necessary.

02 DATED this 26th day of November, 2007.

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04 Mary Alice Theiler
05 United States Magistrate Judge
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